Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. — 73 - 996

GEORGE ERCKMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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KEENAN PRINTING COMPANY

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36 FRD 457 14

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner George C. Erckman respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 2, 1973

OPINION BELOW

The Court of Appeals disposed of this case by an Order. No opinion will be published. No opinion was rendered by the District Court for the Northern Distict of Illinois, Eastern Division.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on November 2, 1973. A timely petition for rehearing was denied on November 27, 1973, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the due process and confrontation provisions of the Constitution were violated by the Court of Appeals finding harmless error in the denial by the trial court of production to the defense of the written report of an Internal Revenue Special Agent for cross examination when the Court of Appeals in so finding failed to grant petitioner the opportunity to inspect the report and argue the prejudicial affect thereof.

2. Whether the presumption of innocence was abrogated in a multi-year prosecution for filing false income tax returns in violation of 26 U.S.C. Section 7206(1) by the understatement of business receipts when a jury instruction stated that willfulness may be inferred from a consistent pattern of understatement of business receipts.

STATUTORY PROVISIONS INVOLVED

Internal Revenue Code of 1954:

Section 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Section 7206. FRAUD AND FALSE STATEMENTS.

Any preson who—

(1) Declaration Under Penalties or Perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

* * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

United States Code, Title 18:

Section 3500. DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prosepective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * *

(e) The term "statement," as used in subsections b), (c) and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

* * *

STATEMENT OF THE CASE

Petitioner was convicted of three counts of filing false income tax returns in violation of 26 U.S.C. § 7206(1) by understanding business receipts for the years 1965, 1966 and 1967. He was sentenced to three years imprisonment and fined $6,000.00. The petitioner was a self-employed diamond setter and jeweler in Chicago, Illinois. On his individual income tax returns the sums of $13,034.00, $15,549.20 and $20,136.40 were designated as gross receipts for the years 1965, 1966 and 1967, respectively. The charge of filing false tax returns for these years arose out of a substantial difference between gross receipts as calculated by the Government and those which were designated by petitioner on his returns.

The Government's case in chief, with the exception of the testimony of an Internal Revenue Special Agent, consisted of evidence of receipts by the petitioner from customers for the sale of labor and merchandise. The Government's evidence showed that for the years 1965, 1966 and 1967, the petitioner received $78,721.55, $96,631.43 and $72,531.97, respectively, from customers. The amount of receipts from customers were not disputed by the petitioner; in fact, in opening argument the petitioner's counsel acknowledged that the Government's figures for gross receipts were substantially correct. The issue before the jury then, was whether the petitioner's conduct in understating business receipts was willful.

The Court of Appeals relying upon income tax evasion cases approved the following instruction relating to willfulness:

> "To establish the crime charged in the indictment the prosecution must prove beyond a reasonable

doubt that defendant wilfully understated his gross receipts or gross sales on his tax return."

"By way of illustration only, *willfulness may be inferred from a consistent pattern of understatement of business receipts*, the destruction of books and records, the handling of financial affairs in a manner as to avoid making the usual records, or from any other conduct which would be likely to mislead or to conceal." (Emphasis added.)

Thus the Court approved an instruction directing guilt, since petitioner admitted business receipts were understated.

The petitioner was 44 years old and had been in the business of being a diamond setter and jeweler for almost 30 years. He went into the business on a full-time basis after completing one semester of high school. Prior to that he worked as an errand boy in the jewelry trade and began learning how to be a diamond setter. Petitioner worked for his father as a diamond setter until the mid 1950's when his father died and he took his father's jewelry inventory.

While working for his father petitioner received a salary and his Federal income tax returns were prepared by his father's accountant. After his father's death the petitioner asked a friend of his, Roy Kiefer, to prepare his individual Federal income tax returns. Kiefer did so from the mid 1950's continuously through the indictment period. The returns were prepared by Kiefer from information submitted by the petitioner. The returns were always prepared at the 11th hour.

The petitioner testified that what appeared on his tax returns for the indictment years on the line provided for gross receipts was not gross receipts but was in fact

what he "made" on his sales, i.e., gross income (gross receipts minus the cost of the goods) and that he had engaged in the practice of reporting what he "made" since his father's death. He testified that he maintained a notebook during the course of each year in which he recorded his profit on the sale of individual items of merchandise and that at the time the tax return was prepared the total of this profit was given to Mr. Kiefer. He testified further that he threw the notebook away after the returns were filed and further that most of the bills he would receive for merchandise were either lost or thrown away either before or after the returns were filed. He kept his tax returns but did not feel it was necessary to keep records of receipts and cost of merchandise.

At trial the only Government witness whose testimony related in any manner to the petitioner's wilfullness was Special Agent Konrad. Agent Konrad prepared a memorandum of his only interview with the defendant and initially stated in that memorandum that the petitioner stated his "gross income of $15,549.20 and $20,136.40 as shown to him on his original income tax return for the years 1966 and 1967 were correct and that the expenses and net profit for the years 1966 and 1967 as shown on Schedule C were also correct." The petitioner testified that what he reported on his tax returns was "what he earned," i.e., gross income rather than gross sales. However, it was Agent Konrad's testimony that the petitioner affirmed the fact that his gross sales per the returns was correct. Agent Konrad struck the word "income" in the typed memorandum and inserted in his own handwriting the word "sales" so that his memorandum as corrected read gross sales instead of gross income.

This memorandum was typed by an Internal Revenue Service secretary from handwritten notes made by Agent Konrad. The handwritten notes were then destroyed. Agent Konrad testified that he compared the notes to the typed memorandum and made the subject correction.

Agent Konrad further testified in essence that he obtained no investigatory leads from the petitioner that he did not ask the petitioner who his customers were; from whom he bought merchandise; whether the petitioner received checks from customers and where the checks were cashed. Yet all the witnesses and stipulations which preceded Agent Konrad's testimony resulted from tracing leads from checks cashed at a currency exchange and at the Michigan Avenue National Bank. The memorandum of interview indicated that the petitioner told Agent Konrad that he had a safety deposit box at the Michigan Avenue National Bank but made no other reference to the bank or the currency exchange where the checks were cashed. Petitioner testified at trial that he volunteered all of the foregoing leads to the Agent.

Petitioner at trial moved for production of the written report of Agent Konrad as a Jencks Act Statement pursuant to 18 U.S.C. § 3500. This motion was denied by the trial court. The Court of Appeals held that petitioner was denied his rights under the Jencks Act by the denial of this motion.

> "The statute requires delivery of statements of government witnesses except for portions 'which do not relate to the subject matter of the testimony of the witness.' We have carefully examined the special agent's report, and some of it clearly relates to the subject matter of his testimony. However, the report would have been of no assistance to defend-

ant, and consequently the failure to deliver it to defendant's counsel was harmless error." (App. 4a)

The Court of Appeals in its Order discussed the reasons why it considered that the Special Agent's Report would not have been helpful to the petitioner, and further stated:

> "We therefore conclude that the special agent's report would not have helped defendant, and failure to produce it was harmless error. We recognize that the test for harmless error being applied by this Court is similar to the test erroneously applied by the district court to determine defendant's right to the report. But the issues before us and before the trial court are different. Under the Jencks Act district judges are mandated to furnish § 3500 material to defendants if it in any way relates to the testimony of the witness, without inquiring into whether it is reasonably necessary or even at all helpful. Reversal is not required here only because the harmless error rule is so clearly applicable to these facts." (App 6a).

The Special Agent's Report was inspected by the Court of Appeals but at no time during the trial nor in the appellate proceedings was the petitioner granted an opportunity to inspect the Special Agent's Report and argue the prejudicial affect of its non production for cross examination.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Applying The Harmless Error Doctrine To Erroneously Withheld Jencks Act Material Without Granting Petitioner Inspection Of The The Material And Argument Upon The Prejudicial Effect Thereof Raises Questions Important To The Administration Of The Jencks Act.

Failure to Permit Showing of Prejudice

In holding that the admitted trial error of failing to produce the Special Agent's Report for cross examination was harmless error within the doctrine of *Rosenberg* v. *United States*, 360 U.S. 367 (1959) the Court of Appeals effectively emasculated the Jencks Act, the decisions of this Court interpreting that Act, and the confrontation clause of the Constitution. *Campbell* v. *United States*, 373 U.S. 487, 496 (1961); *Clancy* v. *United States*, 365 U.S. 312 (1961); *Rosenberg* v. *United States*, 360 U.S. 367 (1959) and *Pointer* v. *Texas*, 380 U.S. 400 (1965). By not permitting petitioner to inspect the erroneously withheld 3500 material, the Court of Appeals prevented a showing of prejudice and substituted its own judgment for that of the trial advocate.

It is axiomatic that the right of cross examination is included within the constitutional protection of confrontaton. At trial petitioner was denied the right to cross examine the Agent on his report. Failure to permit cross examination of the Agent for impeachment and other permissible purposes is unquestionably an error of constitutional magnitude. *Pointer* v. *Texas*, 380 U.S. 400 (1965). Accordingly, the Court of Appeals should have declared its belief that the error was "harmless beyond

a reasonable doubt." *Chapman* v. *California,* 386 U.S. 18, 24 (1967). Such a finding can hardly be supported when petitioner was not given an opportunity to inspect and argue the prejudicial affect of the erroneously withheld Jencks Act material. Where there is a question of whether or not an admitted trial error may be harmless, it is totally incongruous to deny defense access to the erroneously withheld material. Not only did the Court of Appeals fail to declare its belief that the error was harmless beyond a reasonable doubt, such a declaration would be groundless absent granting petitioner inspection and argument. Thus, this situation is analagous to that presented in *Alderman* v. *United States,* 394 U.S. 165, 182 (1969). The margin for error is too great to rely solely upon in camera inspection by either the trial court or an appellate court.

This Court in holding that grand jury testimony should be examined by trial counsel stated:

> "Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhause the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Dennis* v. *United States,* 384 U.S. 855, 875 (1966).

It is not realistic nor compatible with our traditional sense of fairness in appellate proceedings to deny an appellant an opportunity to review and argue the prejudicial effect of 3500 material which he has not seen. The totalitarianistic implications of such a procedure are awesome. This unintentional but subtle assault on the precious rights of due process and confrontation must be

vigorously repelled by this Court. It is essential to the fair administration of justice that this Honorable Court delineate a rational procedure to be employed to prevent an *ipse dixit* finding of harmlessness.

Harmless Error

The Court of Appeal's reliance upon *Rosenberg* v. *United States,* 360 U.S. 367, 371 (1959) to support the conclusion that the error was harmless was misplaced. The singular factor upon which this Court found harmless error in *Rosenberg,* supra, was that "the very same information" (page 371) which the defense attorney sought for cross examination was in fact in his possession. This is not the situation in the case at bar. At no time did the defense possess the very same information which was sought in the case at bar. Consequently, the statement of this Court in *Clancy* v. *United States,* 365 U.S. 312, 316 (1961) is applicable to the case at bar.

> "Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively. As we said in *Jencks* v. *United States,* supra, 353 U.S. 667, 77 S. Ct. 1013 (1957):
>
> 'Flat contradiction between the witness' testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.'
>
> Accordingly we conclude that at least as respects some of these statements reversible error was committed and that petitioners are entitled to a new

trial." *Clancy* v. *United States*, 365 U.S. 312, 316 (1961).

Clancy, supra, was decided two years after *Rosenberg, supra,* and strongly reinforces the attitude of this Court which was expressed in *Rosenberg* at page 371 that:

> "An appellate court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled." *Rosenberg* v. *United States,* 360 U.S. 367, 371 (1959).

Rosenberg does not permit the Court of Appeals to substitute its judgment for that of defense counsel. This is an impermissible limitation on the constitutionally protected right of confrontation.

2. The Uniform And Fair Administration Of The Penal Income Tax Statutes Would Be Substantially Furthered By This Court's Ruling On The Application Of The Concept Of Willfulness In False Return Cases Under § 7206(1).

The Court of Appeals approved an instruction on the crucial issue of willfulness which allowed the jury to conclusively presume that petitioner's conduct was willful and, thus, guilty of the crimes charged. The trial court instructed the jury that:

> "To establish the crime charged in the indictment the prosecution must prove beyond a reasonable doubt that defendant wilfully understated his gross receipts or gross sales on his tax return."
>
> By way of illustration only, *willfulness may be inferred from a consistent pattern of understatement of business receipts,* the destruction of books and records, the handling of financial affairs in a manner

so as to avoid making the usual records, or from any other conduct which would be likely to mislead or to conceal." (Emphasis added.)

This instruction was purported by the Government to be a modification of a tax evasion instruction (LaBuy Instruction Number 13.02-3, 36 FRD 457) which is as follows:

"Conduct Denoting Wilful Attempt

To establish the crime of *income tax evasion* as charged in the indictment the prosecution must prove beyond a reasonable doubt that defendant *willfully attempted to evade or defeat a tax due the government.* This involves the specific intent to evade the tax, and some willful commission or affirmative action by defendant in furtherance of that intent.

By way of illustration only, a willful attempt may be inferred from a consistent pattern of understatement of income, or from such conduct as the refusal to produce for reasonable inspection the book and records, from which net income may be ascertained, the destruction or falsification of books and records, the maintenance of a double set of books, the handling of financial affairs in a manner so as to avoid making the usual records, the concealment of assets or sources of income, or from any other conduct which would be likely to mislead or to conceal." (Emphasis added)

This purported "Modification" was in reality an improper merger of the elements of two different crimes—tax evasion and filing a false return. Under the tax evasion statute, § 7201, there must be evidence that the taxpayer had the specific intent to defraud the Government of a known tax obligation. *Spies* v. *United States,* 317 U.S. 492 (1943). That specific intent may be shown by conduct of the type which is indicated in the subject in-

struction. The existence of a tax deficiency, however, is not an element of the crime charged here (Section 7206 (1)). The Government must prove that the defendant made a wilful false statement as to a material matter on his tax return. *Gaunt* v. *United States,* 184 F. 2d 284 (1st Cir. 1950). A tax evasion motive is not an element of willfulness under this statute. *United States* v. *Cox,* 348 F. 2nd 294 (6th Cir., 1965); *Silverstein* v. *United States,* 377 F. 2d 269 (1st Cir. 1967).

It must be remembered that the crimes with which the petitioner was charged was filing false income tax returns by understating business receipts. The elements of the offense charged under 7206 (1) are (a) the making and subscribing of a return, statement or other document containing a written declaration that it is made under the penalties of perjury, (b) knowledge that the document is not true and correct as to every material matter, and (c) willfulness. *Gaunt* v. *United States,* 184 F. 2d 284 (1st Cir. 1950).

There was no question that gross receipts were understated, so therefore the trial court was in essence telling the jury that if they found that the petitioner understated his receipts his conduct was therefore willful. This is like saying "he did it willfully because he did it." Understatement of receipts *per se* is not indicative of the separate element of willfulness. Such spurious reasoning cannot be the foundation for a conviction. The jury was instructed that willfulness may be inferred from a consistent pattern of understatement of business receipts. This was error since the sole factual issue for the jury to decide was whether the petitioner *willfully* understated his business receipts.

This Court recently held in *United States* v. *Bishop*, 93 S. Ct. 2008 (1973) that willfully has the same meaning in all criminal tax statutes and pointed out the impropriety of the type of instruction that was approved in this case:

> "Semantic confusion sometimes has been created when courts discuss the express requirements of an "attempt to evade" in § 7201 as if it were implicit in the word "willfully" in that statute." *United States* v. *Bishop* at 93 S. Ct. 2008, 2017 (1973), Fn. 8.

The instruction herein is a perfect example of the semantic confusion which this Court referred to in *Bishop, supra,* and was equivalent to a directed verdict of guilty since the jury was told that if the defendant understated his business receipts the understatement was willful. In addition, the instruction totally negated the factors which are indicative of a lack of wilfulness—mistake, accident, negligence, misunderstanding of the requirements of law —good faith reliance on advice of an accountant. The petitioner testified that what appeared on the returns was gross income, i.e., gross receipts, minus cost of goods. He told the jury he believed this was the proper way to file his returns and that he had been doing it this way for years. While the petitioner has no quarrel with the Court of Appeals finding that his contention of "mistake" was dependent upon the jury believing it was true (App. 9a), the instruction prevented the jury from deciding whether or not petitioner was telling the truth. The instruction at issue required conviction whether or not petitioner misunderstood the filing requirements.

The reason for the inclusion of the element of "willfulness' in the statute is that:

> "Congress did not intend that a person by reason of a bonafide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct." *United States* v. *Murdock*, 290 U.S. 389, 396 (1933).

The real issue in prosecutions under § 7206 (1) is petitioner's state of mind in reporting his income. *Silverstein* v. *United States*, 377 F. 2d 269 (1st Cir., 1967). The mere fact that returns are incorrectly filed is not indicative of willfulness *per se*. (See La Buys Instruction 13.01-2 and 13.02-2).

> "The act here involved is the filing of an inaccurate return. In the complexity of success tax laws, many thousands of taxpayers do that innocently. Such filing is unlawful, however, only if made willfully with knowledge of its falseness and with intent to (file a false return). There is no presumption that may be drawn from the act itself—both knowledge and willfulness must be established by independent proof, direct or circumstantial." *Lurding* v. *United States*, 179 F. 2d 419, 422 (6th Cir., 1950).

The Court of Appeals in upholding the contested instruction decided a substantial federal question in conflict with applicable decisions of this Court. *United States* v. *Bishop*, 93 S. Ct. 2008 (1973); *Sansone* v. *United States*, 380 U.S. 343 (1965); *United States* v. *Murdock*, 290 U.S. 389, 396 (1933); *Spies* v. *United States*, 317 U.S. 492 (1943). The definition of willfully in the criminal tax statutes and its application via instructions in the District Courts has been a source of innumerable Appellate decisions. The majority of tax prosecutions turn on the issue of willfulness. Consequently, instructions defining

willfulness and providing for its application are of the utmost importance in the national administration of the penal tax statutes. The instruction at issue raises a substantial question, the resolution of which is necessary to the proper national administration of the income tax laws.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
Heard September 19, 1973
November 2, 1973

Before

Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. A. SHERMAN CHRISTENSEN, Senior District Judge.[1]

UNITED STATE OF AMERICA, *Plaintiff-Appellee,* No. 72-1669 vs. GEORGE C. ERCKMAN, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern District. No. 71-CR-844 Philip W. Tone, Judge.

ORDER

After a jury trial, defendant was found guilty on each of three counts of an indictment charging him with filing

1. District Judge A. Sherman Christensen of the District of Utah is sitting by designation.

false income tax returns for 1965, 1966 and 1967, in violation of 26 U.S.C. § 7206(1). Besides being fined $6,000, he received three-year concurrent sentences on each count.

Defendant was a self-employed diamond setter and jewelry merchant. In the three taxable years, he designated $13,034.00, $15,549.20 and $20,136.40 as his gross receipts, whereas he actually received $78,721.55, $96,631.43 and $72,531.97 from customers. Through his counsel, defendant acknowledged that the Government's figures for gross receipts were substantially correct, so that unreported income in the three years was over $200,000. Therefore, as defendant puts it, the jury issue was whether his conduct was willful.

During the time when defendant's father owned the business, an accountant would put the business records in order each month and at the end of the year prepare defendant's and his father's income tax returns. After his father died in 1955, one of defendant's accountant friends, Roy Kiefer, prepared his income tax returns at the eleventh hour from information submitted by the defendant. The procedure was for defendant to give oral answers to Kiefer's questions as to what amounts should be entered on the return. In answering Kiefer's questions, defendant would consult small, spiral notebooks. After the returns were filed, defendant threw the notebooks away. He also threw away or lost most of the bills he received for merchandise.

Defendant did not tell Kiefer that he sold diamonds and and other merchandise but said that his principal business activity was diamond setting and that his product was labor. He testified that the amounts listed as gross receipts on his tax returns were in truth not gross receipts but were gross income, *i.e.*, gross receipts minus

the cost of goods. He operated on a cash basis and maintained no checking accounts. He did have seven or eight savings accounts. He cashed most of the checks received from the sale of gold, diamonds and merchandise, and the bulk of the proceeds was put in a vault in his office.

Defendant's first argument in support of reversal was that the district court improperly refused to give a lesser included offense instruction. Defendant had tendered an instruction, refused by the trial court, that was founded upon the holding in *United States* v. *Bishop*, 455 F. 2d 612 (9th Cir. 1972). However, *Bishop* was recently reversed, —— U.S. ——, 41 L.W. 4765 (May 29, 1973), and the Supreme Court's opinion obviously controls here.

Defendant next contends that the district court erred in refusing production of Special Agent Eugene Konrad's report to the Chief of the Intelligence Division of the Internal Revenue Service in Chicago, Illinois, concerning defendant. We have recently held in *United States* v. *Cleveland*, 477 F. 2d 310 (7th Cir. 1973), that such a report is ordinarily producible under the Jencks Act (18 U.S.C. § 3500). At the commencement of this trial, defense counsel requested the court to make an *in camera* inspection of that portion of Special Agent Konrad's report that "relates to factual statements bearing on the testimony in this case" to ascertain whether it should be produced for the benefit of defense counsel's cross-examination on Konrad. The Government opposed the motion on the ground that the report was merely a summarization of § 3500 statements to be tendered to the defense counsel.[2]

---

2. When the government witnesses' § 3500 statements were tendered, defense counsel said he did not need them for cross-examination of Konrad. (Tr. 305).

After the *in camera* review specified by 18 U.S.C. § 3500(c), production of the special agent's report was refused by the district judge who stated:

> "I have determined that there is no material * * * in the special agent's report * * * that is reasonably necessary for the defendant's use in making adequate trial preparation."

Under 18 U.S.C. § 3500(c), this was an improper test. The statute requires delivery of statements of government witnesses except for portions "which do not relate to the subject matter of the testimony of the witnesses." We have carefully examined the special agent's report, and some of it clearly relates to the subject matter of his testimony. However, the report would have been of no assistance to defendant, and consequently the failure to deliver it to defendant's counsel was harmless error.

Defendant was given the underlying statements of witnesses and the special agent's memorandum of interview with the defendant. To the extent that the special agent's report duplicated these documents, defendant was not prejudiced. In dealing with a somewhat similar Jencks Act problem in *Rosenberg* v. *United States*, 360 U.S. 367, 371, Justice Frankfurter said:

> "when the very same information was possessed by defendant's counsel as would have been available were error not committed, it would offend common sense and the fair administration of justice to order a new trial. There is such a thing as harmless error and this clearly was such."

That does not entirely dispose of the argument because we cannot accept the Government's contention that the special agent's report only summarized the other documents tendered to defendant. But failure to give defend-

ant other relevant material in the report was also harmless error because there was no inconsistency between Konrad's report and his testimony at trial. It would be a useless gesture to require a new trial in order to present defendant with the dilemma "that examination on the report would only reinforce the witness' testimony whereas failure to use it would do the same." *United States* v. *Annunziato*, 293 F. 2d 373, 382 (2nd Cir. 1961); see also *United States* v. *Allegrucci*, 299 F. 2d 811, 814 (3d Cir. 1962); *Hill* v. *United States*, 421 F. 2d 829 (9th Cir. 1969); *United States* v. *Barson*, 439 F. 2d 128 (5th Cir. 1971).

In addition to his general hope of finding something impeaching, defendant argues that he needed the report for two specific reasons. As originally typed, the memorandum of interview which defendant received referred to his telling Konrad that the "gross income" of $15,549.20 and $20,136.40 on his income tax returns for 1966 and 1967 were correct. After receiving the memorandum from the typist who used his handwritten notes, the special agent had stricken the word "income" and written in the word "sales," together with his initials. The handwritten notes no longer exist. Defendant's counsel tells us that he needed to see the relevant portions of the special agent's report to determine whether the use of "sales" instead of "income" was just a clerical error. However, the report is entirely consistent with the corrected memorandum of interview, for it too uses the term "gross sales" instead of "gross income."

Defense counsel also states that he needed to see the special agent's report because the memorandum of interview referred to defendant's statement that he had a safe deposit box at the Michigan Avenue National Bank,

without any other reference to that bank or the currency exchange where the checks were cashed. The narration of his interview with defendant contained in the special agent's report is even less complete and does not refer to a particular bank or currency exchange. Since the special agent testified that he did not ask defendant where the checks were cashed, his report is again entirely consistent with his testimony.

We therefore conclude that the special agent's report would not have helped defendant, and failure to produce it was harmless error. We recognize that the test for harmless error being applied by this Court is similar to the test erroneously applied by the district court to determine defendant's right to the report. But the issues before us and before the trial court are different. Under the Jencks Act district judges are mandated to furnish § 3500 material to defendants if it in any way relates to the testimony of the witness, without inquiring into whether it is reasonably necessary or even at all helpful. Reversal is not required here only because the harmless error rule is so clearly applicable to these facts.

Defendant also objects to the prosecutors' summation and rebuttal statements that defendant had lied. While we deplore these instances, there were various episodes in defendant's testimony illustrating his lack of credibility. During the Government's opening argument, the court reminded the jury to rely on its own recollection of the evidence rather than on "what either counsel says the evidence was." In its charge, the court reiterated that "Statements and arguments of counsel are not evidence."

While referring to defendant's "lies," the prosecutors refrained from overtly stating this as their personal opin-

ion. In the future, they and other counsel must heed the wise precepts of then Judge Burger in *Harris* v. *United States,* 402 F. 2d 656, 659 (D.C. Cir. 1968):

> "The prosecutor is certainly free to strike hard blows at witnesses whose credibility he is challenging. But what he may not do is divert the focus of the jury's consideration of the case from the facts in evidence to the attorney's personal evaluations of the weight of the evidence. The personal evaluations and opinions of trial counsel are at best boring irrelevancies and a distasteful cliche-type argument. At worst, they may be a vague form of unsworn and irrelevant testimony."[3]

Because defendant's credibility was so thoroughly impugned by his own testimony, we decline to reverse despite the improper characterizations made by the Assistant United States Attorneys in their final arguments to the jury.

Defendant objects for two reasons to the giving of Government Instruction 28, which was drawn from La Buy Instruction 13.02-3 (36 F.R.D. 560-561). The first reason is based on defendant's claim that willfulness in the false return statute (26 U.S.C. § 7206(1)), on which this indictment was based, differs from the meaning of willfulness in the tax evasion statute (26 U.S.C. § 7201). However, in *Bishop* v. *United States,* —— U.S. ——, ——, 41 L.W. 4765, 4769, the Supreme Court decided that Congress used the word "willfully" in the hierarchy of tax offenses "to describe a constant rather than a variable in the tax penalty formula." Consequently, the underpinning of this objection has been obliterated.

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3. See also Judge Burger's comments in *Gibson* v. *United States,* 403 F. 2d 569, 570 n. 1 (D.C. Cir. 1968).

Secondly, defendant criticizes that part of Instruction No. 28 which states "By way of illustration only, willfulness may be inferred from a consistent pattern of understatement of business receipts * * *." Defendant argues that he based his returns on the same misunderstanding of the law for fifteen years, and that a consistent pattern of understatement thus supports a finding of mistake rather than willfulness. This is true if, and only if, the jury believed his explanation. Defendant's counsel argued the significance of his explanation to the jury and nothing in Government Instruction 28 prevented the jury from finding that defendant was mistaken. The instruction said that the jury "may" — not "must" — infer willfulness from a consistent pattern of understatement, and the jury had also just been instructed that "defendant's conduct is not willful if he acted * * * due to his good faith misunderstanding of the requirements of the law" (Tr. 616).

Government Instruction 28 has substantial support in the case law. The pertinent part of the source La Buy instruction refers to willful income tax evasion (26 U.S.C. § 7201) and states: "By way of illustration only, a willful attempt may be inferred from a consistent pattern of understatement of income * * * (36 F.R.D. 561)." The La Buy comment shows that the instruction was based largely on *Spies* v. *United States*, 317 U.S. 492, 499, and that the portion referring to "a consistent pattern of understatement of income" was drawn from *Holt* v. *United States*, 272 F. 2d 272, 274-275 (9th Cir. 1959), and *United States* v. *Northern*, 329 F. 2d 794, 795 (6th Cir. 1964). The instruction also harmonizes with *United States* v. *Eley*, 314 F. 2d 127, 132 (7th Cir. 1963). See 36 F.R.D. 562-563.

Defendant also complaints of Government Instruction No. 21, which is a modified version of La Buy Instruction 6.14 (33 F.R.D. 592). The instruction given reads as follows:

> "Evidence has been introduced that defendant made certain statements outside of the courtroom. Evidence contradicting such statements has also been introduced. If the jury finds that the statements were untrue, and that the defendant made them voluntarily with knowledge of their falsity, the jury may consider the statements as circumstantial evidence of defendant's consciousness of guilt."

Defendant states that this instruction was a clearly erroneous statement of law. However, it is consonant with *Wilson* v. *United States*, 162 U.S. 613, 620-621, and other authorities contained in the La Buy Comment (33 F.R.D. 592-594). Defendant also states that there is no basis in evidence for the instruction. On the contrary, Special Agent Konrad testified that defendant denied having a personal savings account or business checking account. At trial, defendant contradicted this statement. Likewise, he told the special agent that the amounts shown as gross receipts on his pertinent income tax returns were correct, and yet at trial, through his counsel, he acknowledged that the Government's much higher gross receipt figures were correct. Therefore, there was sufficient evidentiary basis for the instruction.

Defendant assails the court's refusal to give his Instruction No. 29 to the effect that knowledge must be established here in order to find the defendant guilty. However, the Government's Instruction No. 27 defining willfulness and defendant's Instruction No. 30 on willfulness adequately presented this theory of defense.

Finally, defendant submits that the district court erred in refusing to give his Instruction No. 35 bearing on tax treatment of inherited property. Since there was no evidence whether defendant ever inherited any property from his father or any evidence of its value, such an instruction would have been erroneous. *United States* v. *Breitling,* 61 U.S. (20 How.) 252, 254-255.

Judge Fairchild concurs except that he would prefer to give defense counsel an opportunity to see the material erroneously withheld and to attempt to persuade the court that the error was not harmless before the court decides that it was. Cf. *Dennis* v. *United States,* 384 U.S. 855, 875.

Judgment affirmed.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
November 27, 1973

Before

Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. A. SHERMAN CHRISTENSEN, Sr. District Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee* No. 72-1669 vs. GEORGE C. ERCKMAN, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. (71 CR 844)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.